

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff

v.

TROY X. KELLEY,

Defendant.

NO. CR 15-5198RBL

UNITED STATES' RESPONSE TO
DEFENDANT'S MOTION *IN LIMINE* TO
EXCLUDE 404(b) EVIDENCE
REGARDING JASONE JERUE

The United States of America, by and through Annette L. Hayes, United States Attorney for the Western District of Washington, and Andrew C. Friedman, Katheryn K. Frierson, and Arlen R. Storm, Assistant United States Attorneys for said District, hereby files this United States' Response to Defendant's Motion *In Limine* to Exclude 404(b) Evidence Regarding Jason Jerue.

I. Facts

During the course of the scheme to defraud alleged in the Superseding Indictment, Jason Jerue acted as the Operations Manager for Troy Kelley's company, Post Closing Department. After class action lawsuits were filed, Kelley quickly shut down Post Closing Department in Washington and changed the name of the business in Oregon, to

1 Attorney Trustee Services. He then transferred Jerue to the Attorney Trustee Services
2 payroll .

3 Jerue was only one of two Post Closing Department employees who Kelley
4 transferred to the Attorney Trustee Services payroll. The other, A.M., worked for
5 Attorney Trustee Services for only a couple months. Jerue, however,
6 continued to work at Attorney Trustee Services through September 2009, when Kelley
7 also shut it down.

8 On September 6, 2011 - a week after the unemployment Jerue received as a result
9 of his employment at Attorney Trustee Services ran out - Kelley mailed Jerue a check for
10 \$9,980. In April 2012, Kelley declared his candidacy for the elected position of
11 Washington State Auditor. Thereafter, on July 12, 2012, Kelley issued a check for
12 \$9,985, which was intended for Jerue's benefit.

13 In November 2012, Kelley was elected Washington State Auditor. During March
14 2013, Kelley hired Jerue to work in the Washington State Auditor's Office. At that time,
15 Jerue was residing in California.

16 **II. Procedural History**

17 On January 22, 2016, the government notified defense counsel that it intended to
18 admit at trial evidence relating to Troy Kelley's favorable treatment of Jason Jerue after
19 shutting down Post Closing Department. On March 10, 2016, the defense filed its
20 Motion *In Limine* to exclude such evidence.

21 **III. Argument**

22 Evidence of other crimes, wrongs, or acts is admissible to prove intent, knowledge,
23 or motive. Fed. R. Evid. 404(b). Such evidence may be admitted if: (1) the evidence
24 tends to prove a material point; (2) the other act is not too remote in time; (3) the
25 evidence is sufficient to support a finding that the defendant committed the other act; and
26 (4) (in certain cases) the act is similar to the offense charged. *United States v. Chea*, 231
27 F.3d 531, 534 (9th Cir. 2000). Prior to admitting the evidence under Rule 404(b),
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1 however, the district court must determine whether the danger of undue prejudice
 2 substantially outweighs the probative value of the evidence. Fed. R. Evid. 404(b); 403;
 3 *Huddleston v. United States*, 485 U.S. 681, 690-91 (1988).

4 Evidence is not considered other crimes evidence when the evidence concerning
 5 the other act and the evidence concerning the crime charged are inextricably intertwined.
 6 *United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987) (quoting *United States v.*
 7 *Aleman*, 592 F.2d 881, 885 (5th Cir. 1979)). “[T]he policies underlying the rule are
 8 simply inapplicable when some offenses committed in a single criminal episode become
 9 other acts because the defendant is indicted for less than all of his actions.” *Id.* (quoting
 10 *Aleman*, 592 F.2d at 885).

11 “Evidence demonstrating a defendant’s consciousness of guilt is admissible under
 12 Fed. R. Evid. 404(b) if the court determines that the evidence is more probative than
 13 prejudicial under Fed. R. Evid. 403.” *United States v. Bein*, 728 F.2d 107, 114-15 (2d
 14 Cir. 1984). The concealment of evidence subsequent to the commission of a crime may
 15 indicate consciousness of guilt and should be placed before the trier of fact.
 16 *United States v. Jaramillo-Suarez*, 950 F.2d 1372, 1384 (9th Cir. 1991); *United States v.*
 17 *Castillo*, 615 F.2d 878, 885 (9th Cir. 1980).

18 In the present case, the government will seek to admit evidence of Troy Kelley’s
 19 repeated payments to and favorable treatment of Jason Jerue after shutting down Post
 20 Closing Department. Despite the innocent explanations that can be and are offered for
 21 each individual act, Kelley’s treatment of Jerue, as a whole, suggests Kelley’s
 22 consciousness of guilt – particularly in light of the fact that the government also will offer

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evidence that Kelley does not freely give away money. Accordingly, the evidence is properly admitted. *Bein*, 728 F.2d at 114-15.

IV. CONCLUSION

For the foregoing reasons, the Court should admit testimony regarding payments by Troy Kelley to Jason Jerue.

DATED this 13th day of March, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney of record for the defendant.

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